

Legal Discrimination in the United States based on Sexual Orientation and Gender Identity

Mark C. Miller

Clark University

Abstract: *When the U.S. Supreme Court declared that same-sex marriage would be legal throughout the country, that decision did not end the possibility of other types of discrimination on the basis of sexual orientation or gender identity. The U.S. Supreme Court has been very unclear about what standard to use when the courts face claims of discrimination based on these characteristics. In cases decided under the Fourteenth Amendment's Equal Protection Clause, the Court has stated that lower courts should use one of three standards, based on the type of discrimination alleged. These three standards for review are known as rational basis, intermediate review, and strict scrutiny. This article, based on both empirical and normative analysis, will explore the proper legal standard that the Supreme Court should use in these cases. Since several states have begun to enact laws that encourage discrimination on the basis of sexual orientation and gender identity, this article will argue that the Supreme Court should use strict scrutiny in these cases because the LGBT community is clearly a discrete and insular minority subject to targeted discrimination.*

Key words: *discrimination, equal protection, sexual orientation, gender identity, constitutional analysis*

When the Supreme Court of the United States in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) declared that same-sex marriage would be legal throughout the country, that decision did not end the possibility of other types of discrimination on the basis of sexual orientation or gender identity in the United States. After marriage equality, the next gay rights frontier in equal protection or anti-discrimination law involves discrimination in employment, in housing, over such family law issues as child custody and

adoption, and in so-called public accommodations (private businesses and other private venues that are open to the entire public plus publically owned facilities) (see e.g. Sanders). There is currently no broad overarching federal anti-discrimination law prohibiting discrimination on the basis of sexual orientation or gender identity (see Sanders, 244), and what protections that do exist come from a patchwork of mostly state and local laws plus some limited federal regulations (see e.g. Stone, 142-43).

In fact, in the current political climate, various state and local laws have been enacted recently that actually encourage discrimination against lesbian, gay, bisexual, transgender (LGBT), and other sexually non-conforming persons. One study reports that between 2013 and early 2016 there were 20 anti-LGBT laws enacted in various states. In addition, the number of bills introduced in state legislatures to limit LGBT rights has been increasing greatly (Blow). These laws are often couched in terms of protecting the religious liberty of those who have religious objections to homosexuals and other sexually non-conforming individuals. It is not clear how the U.S. Supreme Court will approach these discriminatory laws. The Supreme Court's decisions have been quite vague about the standard of review that the courts should use to resolve allegations of discrimination on the basis of sexual orientation or gender identity (see e.g. Mezey, 54-56). This article will argue that American courts should use the highest level of review to strike down legislation and practices that further discrimination against LGBT individuals.

The constitutional foundation for all legal anti-discrimination measures in the United States is the Fourteenth Amendment's Equal Protection Clause, which prohibits states and by extension the federal government from denying "to any person within its jurisdiction the equal protection of the laws." With the most notable early example being *Brown v. Board of Education*, 347 U.S. 483 (1954), where the Court declared racial segregation in the public schools to be unconstitutional, the U.S. Supreme Court has often used the Equal Protection Clause in recent decades to strike down various laws that discriminated against specific groups. Equal protection analysis is quite complex, with the Supreme Court beginning by determining the grouping or classification for the law in question, and then applying one of three levels of review for that specific group. Thus, anti-discrimination law is primarily based on group membership. As one scholar has explained, "Equal protection claims, by their very nature, assume group classifications and demand that the group at bar be easily acknowledged and treated the same as everyone else" (Pedriana, 73).

The three standards or levels of review that the Supreme Court uses when approaching discrimination claims under the Equal Protection Clause are the rational basis test, intermediate review, and strict scrutiny. The lowest standard of review is the rational basis test, used for most ordinary governmental regulation. This test generally states that for the court to uphold the constitutionality of the law the statute in question must be a reasonable measure designed to achieve a legitimate governmental interest. The intermediate review test in its original form, used most often for sex discrimination claims, states that the law must be substantially related to the achievement of an important governmental interest. A heightened level of intermediate review sometimes used by the Supreme Court says that the law in question must also have an exceedingly persuasive justification. Strict scrutiny, the highest standard of review most often employed for suspect classifications based on race or other discrete and insular minorities, states that for the statute to be held constitutional it must be the least restrictive means available to achieve a compelling governmental interest (see e.g. Epstein and Walker, 605). The “discrete and insular minorities” language comes from the Supreme Court’s most famous footnote, footnote 4 in its opinion in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), where the Court implied that a heightened level of review would be appropriate for claims of discrimination against discrete and insular minorities. Strict scrutiny is used for claims of discrimination against suspect classes and for claims that a fundamental right has been violated. The fundamental rights acknowledged by the Supreme Court in this context include the right to vote, the right to travel (meaning the right to live anywhere in the United States), the right of individual privacy, and various rights found in the First Amendment (including religious rights, free speech rights, and free press rights).

The decision of which standard of review a court should use is an extremely important one. As a rule of thumb, the Supreme Court usually declares the statute in question to be unconstitutional when it uses the strict scrutiny test. As one set of scholars has written, “When the suspect class test [strict scrutiny] is used, the Court presumes that the state action is unconstitutional, and the burden of proof is on the government to demonstrate that the law is constitutional” (Epstein and Walker, 603-604). However, the Court usually upholds the constitutionality of the law under the rational basis test. As a different scholar has explained, “The courts afford legislatures extreme deference for ordinary economic and social statutes” (Greenawalt, 364). For intermediate review, sometimes the Court upholds the law and

sometimes it strikes it down (see e.g. Fisher and Harringer). This article will argue that the U.S. Supreme Court should use strict scrutiny when considering discrimination against LGBT people.

In addition to the constitutional protections against discrimination found in the Fourteenth Amendment, Congress has also enacted a foundational anti-discrimination law, the Civil Rights Act of 1964. The federal Civil Rights Act of 1964 prohibits discrimination on the basis of race, sex, religion, and national origin in three protected activities: employment, federally funded programs like education, and public accommodations. The Americans with Disabilities Act of 1990 added disability to the list of protected groups in the Civil Rights Act. Efforts in Congress began in 1976 to add sexual orientation and/or gender identity to the list of protected groups in the Civil Rights Act (Klarman, 24), but these efforts have continuously failed since then (see Sanders, 244), even though the U.S. House of Representatives did pass a version of the bill in 2007 (Klarman, 119) and the U.S. Senate passed a different version of the bill in 2013 (Davis). In this area of the law, the line is often blurred between a discrimination case decided on constitutional grounds and a case decided on purely statutory grounds. Since many types of discrimination trigger both a constitutional violation and a statutory violation, the courts in the United States are not always clear in separating these two sources of law.

As part of the comprehensive anti-discrimination federal law, various titles of the Civil Rights Act enacted at different times since 1964 provide additional important federal anti-discrimination protections. For example, Title VII of the Civil Rights Act covers discrimination in the workplace context (see Epstein and Walker, 607) while Title IX requires equal treatment of the sexes in all education institutions including secondary education and higher education (see Epstein and Walker, 608). The federal Equal Employment Opportunity Commission has ruled that employment discrimination on the basis of both sexual orientation and gender identity violates Title VII. However, it is unclear whether that agency view will be upheld if challenged in federal courts (Carpenter). A federal appeals court, the Fourth Circuit Court of Appeals in the case of *G.G. v. Gloucester County Board of Education* (2016), recently accepted the U.S. Department of Education's view that discrimination on the basis of gender identity qualifies as sex discrimination and thus violates Title IX. The U.S. Department of Justice has also claimed that discrimination based on both sexual orientation and gender identity violates both Title VII and Title IX (see Lichtblau and

Fausset, A1). In 2014, President Obama signed an executive order prohibiting federal contractors from discriminating on the basis of sexual orientation or gender identity. The order also protects federal employees from such discrimination (Davis). Unfortunately, the order could be easily reversed by the next president. In the spring of 2016, Congress considered legislation that would overrule this executive order (Rein and Demirjian). Then in May of 2016 the U.S. House of Representatives voted 213-212 against an amendment that would have continued the protection of LGBT employees of federal contractors (Werner).

In addition to these limited federal protections against discrimination on the basis of sexual orientation or gender identity, there is a patchwork of state and local anti-discrimination laws. As of September 2015 twenty-two states and the District of Columbia prohibited discrimination on the basis of sexual orientation, and nineteen of these states plus the District of Columbia also prohibited discrimination on the basis of gender identity (Sanders). This area of the law is changing quickly. For example, in July 2016 Massachusetts added gender identity to its anti-discrimination law (which already prohibited discrimination due to sexual orientation) (Bernhard). Many urban areas, especially in the more conservative states which do not have state-wide anti-discrimination laws that prohibit discrimination against LGBT people, have enacted local anti-discrimination ordinances to protect LGBT individuals (see Robertson and Fausset). However, voters in Houston in November of 2014 repealed their local anti-discrimination law previously enacted by the city council (Moyer). In a reaction to the local laws, three states (Arkansas, Tennessee, and North Carolina) have recently enacted state laws that prohibit local anti-discrimination ordinances (Guo, 2016). Some states such as North Carolina and Mississippi are enacting wide-ranging laws that are often seen as allowing anti-LGBT discrimination (Katz and Eckholm). The Governor of Georgia in 2016 vetoed similar legislation passed by the Georgia state legislature (Blinder and Perez-Pena), and in 2015 Indiana and Arkansas rewrote newly enacted religious liberty laws that were perceived to encourage discrimination against LGBT persons (Guo, 2015). These new laws will be discussed in more detail later in the article.

The U.S. Supreme Court has not given consistent answers to questions about how lower courts should approach constitutional claims of discrimination based on sexual orientation or gender identity. In fact, in the first major gay rights case heard by the Supreme Court, *Bowers v. Hardwick*, 478

U.S. 186 (1986), the majority of the Court refused to recognize any rights for the LGBT community when they failed to strike down a state anti-sodomy law. In *Bowers*, the police lawfully entered a home and discovered two men engaged in consensual sex. At the time, the state of Georgia had a statute prohibiting sodomy. The statute defined sodomy to preclude all homosexual sexual activity as well as a great deal of heterosexual sexual activity. Although the police later dropped the charges, Hardwick (one of the men who had been arrested) sued, claiming that the Georgia law violated his constitutional rights. The majority of the Supreme Court disagreed in a 5-4 vote against gay rights. The language in Chief Justice Burger's concurrence in the case was an especially harsh attack against homosexual persons in general and against the concept of gay rights in particular. The four dissenting justices, however, argued that the Georgia law should be struck down on privacy grounds. They also attacked the majority for being homophobic, arguing that sexual privacy was important for both heterosexuals and for homosexuals (see Richards). The *Bowers* decision was a major setback for LGBT persons. As one commentator has noted, "The gay rights community was devastated by *Bowers*. ... Lower courts cited *Bowers* to justify all manner of discrimination against gays" (Klarman, 37-38).

Bowers remained the law of the land for decades, until the U.S. Supreme Court finally overturned it in *Lawrence v. Texas*, 539 U.S. 558 (2003). The facts in *Lawrence* were exceptionally similar to those in *Bowers*. Police lawfully entered a home in Texas, and discovered two men having consensual sex. The men were then arrested under a Texas statute that specifically prohibited homosexual sodomy, unlike the Georgia statute in *Bowers* which had prohibited all types of sodomy. The Texas authorities pursued the criminal case, and it eventually reached the U.S. Supreme Court. In a 6-3 decision, based mostly on the constitutional right of privacy, the Court's majority opinion written by Justice Kennedy declared the Texas law to be unconstitutional, thus overturning the Court's previous decision in *Bowers* (see Richards). The Court's opinion, however, did imply that the law also violated the Equal Protection Clause. Justice Kennedy noted in his *Bowers* opinion, "When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres" (539 U.S. at 575). Justice O'Connor's concurrence in *Lawrence* is also notable because she used the Equal Protection Clause instead of the privacy line of precedent to strike down the law because the Texas law only targeted homosexual sodomy. Jus-

tice O'Connor wrote in this case, "A law branding one class of persons as criminal solely based on the State's moral disapproval of that class and the conduct associated with that class runs contrary to the values of the Constitution and the Equal Protection Clause, under any standard of review" (539 U.S. at 585 (2003)). Note, however, that this decision did not answer the question of what standard of review future courts should use to decide discrimination claims based on sexual orientation or gender identity.

The first major gay rights decision from the U.S. Supreme Court to use the Equal Protection Clause to protect LGBT people was *Romer v. Evans*, 517 U.S. 620 (1996). This case involved an amendment to the state Constitution of Colorado that prohibited local anti-discrimination laws on the basis of sexual orientation. The state constitutional amendment was unambiguous in targeting the LGBT community specifically. Liberal cities in Colorado like Denver, Aspen, and Boulder started passing local anti-discrimination laws that included discrimination on the basis of sexual orientation. In other words, the local anti-discrimination ordinances treated discrimination on the basis of sexual orientation the same as discrimination on the basis of race, sex, religion, national origin, or disability. Conservatives in the state were outraged, and the voters then amended the state constitution to outlaw such local anti-discrimination ordinances or to give "special rights" to LGBT individuals. Interestingly, the state Supreme Court of Colorado struck down the state constitutional amendment as violating the Equal Protection Clause of the U.S. Constitution. The state supreme court used the strict scrutiny test in their decision. In a vote of 6-3, the U.S. Supreme Court in an opinion written by Justice Kennedy also declared the state constitutional amendment to be in violation of the federal constitution's Equal Protection Clause, but the majority on the nation's highest court used the rational basis test instead of strict scrutiny (see Mezey, 59-64). *Romer* is the notable exception where the Supreme Court declared a law to be unconstitutional using the rational basis test. On the one hand, *Romer* was a major victory for the gay rights movement, where Justice Kennedy wrote a "passionate" opinion striking down the discriminatory law (see Knowles, 94). On the other hand, the Kennedy opinion provided no guidance to future courts on the question of what standard of review should be used for claims of discrimination on the basis of sexual orientation, much less gender identity (see e.g. Farber and Sherry). The Court's refusal to state what level of review was appropriate for Equal Protection claims for discrimination on the basis of sexual orientation continues to this day.

Same-sex marriage was the next issue for the Supreme Court's Equal Protection analysis in this area, involving three separate same-sex marriage decisions. *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) is the first same-sex marriage decision from the Supreme Court, but it did nothing to explain what standard of review the courts should use for discrimination based on sexual orientation. In June of 2008, the California Supreme Court declared that there was a right to same-sex marriage under the state constitution. In November of 2008, the voters in the state amended the state constitution to prohibit same-sex marriage through the passage of Proposition 8. A lawsuit was then filed, which claimed that Proposition 8 was unconstitutional. The trial judge on the U.S. District Court found that Proposition 8 was in fact unconstitutional under the federal constitution, using the strict scrutiny standard of review. The U.S. Court of Appeals for the Ninth Circuit agreed with the District Court's outcome, but instead found Proposition 8 to be unconstitutional using the rational basis test. When the case reached the U.S. Supreme Court, state officials refused to defend Proposition 8. The U.S. Supreme Court did not reach the merits of the case, but instead ruled that the parties defending the constitutionality of Proposition 8 did not have standing to bring the case to court. Thus, based solely on the technical question of standing, the Supreme Court reverted to the circuit court's ruling that Proposition 8 was unconstitutional, without reaching the Equal Protection issue. Same-sex marriage became legal in the state of California, but the precedent established in *Hollingsworth* was extremely narrow and did not apply to same-sex marriage bans imposed by other states nor by the federal government.

The next U.S. Supreme Court ruling regarding same-sex marriage came in *United States v. Windsor*, 133 S.Ct. 2675 (2013). In this case, the Supreme Court struck down the federal Defense of Marriage Act of 1996. Congress passed this statute in reaction to a decision by the Hawaii Supreme Court in *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (1993) that declared that the state constitution required same-sex marriage (see Pinello, 25-29). The Hawaii court used strict scrutiny in interpreting the state constitution's equal protection clause. It also appeared that the Alaska Supreme Court might be moving in the same direction (see Klarman, 66-68). The state legislatures in both these states quickly amended their state constitutions to prohibit same-sex marriage before any actual same-sex marriages were performed, and the voters approved these constitutional amendments. Nevertheless, even though same-sex marriage was at that point still hypothetical, Congress

quickly passed the federal Defense of Marriage Act and President Clinton quietly signed the bill into law just before the 1996 elections. The federal Defense of Marriage Act stated that for federal purposes marriage would be defined as only between one man and one woman. The Act also allowed the states to ignore same-sex marriages performed in other states (see Mezey, 98-101).

The federal Defense of Marriage Act had no real effect until Massachusetts became the first state to make gay marriages a reality after the Massachusetts Supreme Court in *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E. 2d 941 (2003) declared a right to same-sex marriage under the Massachusetts constitution. In the *Goodridge* decision, the Massachusetts Supreme Judicial Court used strict scrutiny in interpreting the state constitution's equal protection clause. Soon other state courts began to follow the Massachusetts example, including California, Connecticut, and Iowa. Eventually judges in 26 states invalidated state bans on same-sex marriage (Epstein and Walker, 438). State legislatures in many Northeastern states including New York, Vermont, and New Hampshire enacted same-sex marriage legislation, and the voters in Maine, Maryland, and Washington approved same-sex marriage ballot initiatives in 2012 (New York Times). The spread of same-sex marriage through various states brought with it a series of lawsuits challenging the constitutionality of the federal Defense of Marriage Act.

Specifically, the *Windsor* case involved two women who were lawfully married under New York law. When one of the spouses died, the federal government subjected her estate to federal estate taxes because the federal Defense of Marriage Act (DOMA) prevented the federal government from recognizing the same-sex marriage. Under federal law, there is no federal estate tax due when a spouse dies and the estate automatically passes to the surviving spouse. The surviving spouse, Windsor, sued, claiming that the federal Defense of Marriage Act was unconstitutional under the federal constitution's Equal Protection Clause. The U.S. Court of Appeals for the Second Circuit struck down the federal law as unconstitutional, using the intermediate review standard under the theory that discrimination on the basis of sexual orientation was equivalent to sex discrimination. The Circuit Court ruled that homosexuals were a "quasi-suspect class" to justify their use of intermediate review (Klarman, 363). The Obama Administration refused to defend the Defense of Marriage Act in the courts (Fisher and Harringer, 914).

In an opinion written by Justice Kennedy in *U.S. v. Windsor*, the U.S. Supreme Court declared the federal Defense of Marriage Act to be unconstitutional, but mostly on federalism grounds with due process and equal protection overtones. The states had a right to protect various groups from discrimination, and Congress had no right to interfere with these state protections. As Justice Kennedy wrote, “DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government. ... The Constitution’s guarantee of equality must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot justify disparate treatment of that group” (133 S.Ct. at 2693). While the Court’s majority clearly saw DOMA as violating the Equal Protection Clause, the opinion does not address the question of what standard future judges should use in deciding cases claiming discrimination on the basis of sexual orientation or gender identity. Interestingly, almost all federal courts read *Windsor* as precedent for striking down state same-sex marriage bans (Epstein and Walker, 438).

The most recent case in the same-sex marriage trilogy is *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). While the vast majority of U.S. circuit courts of appeals were declaring state bans on same-sex marriage to be unconstitutional, the Sixth Circuit ruled the other way, using the rational basis test from *Romer*. The U.S. Supreme Court accepted the case, and overturned the Sixth Circuit’s decision. In this case, the Supreme Court in an opinion again written by Justice Kennedy declared unconstitutional all state bans on same-sex marriages. Also, all states had to recognize same-sex marriages performed in other states. The Court’s majority opinion in this landmark case did say that same-sex marriage was a fundamental right of privacy that implicated equal protection rights as well. Wrote Justice Kennedy, “The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation” (135 S.Ct. at 2599). Thus, this ruling stated that state bans on same-sex marriage violated the U.S. Constitution’s Equal Protection Clause without elaborating on what standard the courts should use for future cases of discrimination based on sexual orientation or gender identity.

While academics and others on the left cheered the results in *Obergefell*, there nevertheless was much concern that the Court failed to declare LGBT persons to be a suspect class that deserved the protection of strict scrutiny

review. Although some judges and academics have long suggested that discrimination against LGBT individuals should receive strict scrutiny, Justice Kennedy, the main author of the Supreme Court's gay rights decisions, has never endorsed that view. Scholars such as John Hart Ely in the early 1980's called for the LGBT community to be considered a discrete and insular minority and thus treated as a suspect class (Ely 162-64). As Mohr explained in 1988, "If given the status of a suspect class with attendant Constitutional protections under the fourteenth amendment, gays would be largely spared legislation that is targeted against them" (Mohr, 169).

In all of his gay rights opinions, Justice Kennedy has refused to use traditional equal protection analysis, instead relying on notions of human dignity that reject animus toward specific groups. Noting that Justice Kennedy was the author of all of the Supreme Court's opinions advancing gay rights, Peter Nicolas observes that, "As both the author and often the deciding vote in each of these four cases, Justice Kennedy will no doubt leave behind one of the most important gay rights legacies in U.S. legal history" (Nicolas, 137). But this scholar goes on to conclude that in failing to use strict scrutiny or at least intermediate review for cases involving LGBT discrimination, gay rights did not advance as far as they should have. According to Nicolas, "This heightened level of scrutiny would in turn give gays and lesbians a measure of repose, affording them the same certainty that racial minorities and women have that laws targeting them are unlikely to be upheld by courts today" (Nicolas, 138). Another commentator, David Bernstein, was especially harsh in his criticism of Justice Kennedy's opinion in *Obergefell*. Bernstein wrote, "Justice Kennedy's opinion implicitly continues his campaign to undermine post-New Deal constitutional doctrine on due process and equal protection. . . . Kennedy does not even address the possibility that homosexuals are a suspect class (which to my mind would have been the strongest rationale for the Court's decision)" (Bernstein).

So far, Kennedy's concept of human dignity has resulted in gay rights victories. This concept seems deeply embedded in Kennedy's judicial philosophy. As Colucci notes, "Kennedy's opinions across several areas of constitutional law sketch an ideal of human dignity shaped in rhetoric and substance by post-Vatican II Catholicism. He cites social science research, economic and social developments, and comparative constitutional law as objective referents to justify his conceptions of liberty and dignity" (Colucci, 170). Kennedy's notion of human dignity, however, does not provide as much protection to the LGBT community as would suspect class treatment.

Thus, Justice Kennedy's jurisprudence leaves the rational basis test as the only level of analysis available for courts that face constitutional claims of discrimination against LGBT people. As Epstein and Walker note, "Despite the importance of *Obergefell*, *Romer v. Evans* remains the Court's most significant interpretation of the equal protection clause as it applies to classifications based on sexual orientation" (Epstein and Walker, 689).

Critics on the right were of course also quite unhappy with the Supreme Court's *Obergefell* decision. For example, Kim Davis, an obscure county clerk in Kentucky, became quite famous worldwide when she refused to issue marriage licenses for same-sex couples after the Court's ruling (Blinder). Conservative politicians also reacted quite negatively to the Supreme Court's decision. Several states rushed to pass so-called Religious Freedom Restoration Acts that would have allowed individuals on religious grounds to refuse to provide services to same-sex couples. In 2015, the state legislatures in Indiana and Arkansas enacted so-called religious liberty bills that critics said would allow open discrimination against LGBT people. Under intense pressure from the business community, Indiana then quickly amended its law to prevent the use of the law in discrimination suits based on sexual orientation or gender identity. Arkansas also changed its law due to business pressure, although the actual practical effects of the new law in Arkansas remain murky (Guo, 2015). In 2016, Mississippi enacted a sweeping new state law that allowed businesses to refuse to give service to LGBT people on the basis of religious objections to homosexuality or gender non-conformity (Guo, 2016). The Mississippi law attempted to protect the religious views of those who oppose same-sex marriage, who oppose sex outside of marriage, and who believe that a person's gender is determined at birth. Opponents said that the law encouraged discrimination against LGBT individuals. A federal trial judge on the U.S. District Court in Mississippi declared the law to be unconstitutional in 2016, and refused to allow it to go into effect (Associated Press). State legislatures in Arizona (Guo, 2015), Virginia (Fausset), and Georgia (Blinder and Perez-Pena) also have passed similar religious freedom laws, but the governors of those states vetoed the bills, in large part because of the strong opposition of business interests to them. The intent of the legislatures was clear: they wanted to find a legal mechanism for religiously motivated people to avoid supporting LGBT rights.

Conservatives in various state legislatures were also concerned that gay rights were creeping into their states through local anti-discrimination ordi-

nances designed to protect the rights of LGBT people. In response to these local anti-discrimination ordinances that would have provided protection against discrimination on the basis of sexual orientation or gender identity, three states have recently enacted state laws that overrule these local discrimination ordinances. The state legislatures in Arkansas, Tennessee, and North Carolina preempted local governmental anti-discrimination efforts in Fayetteville, Nashville, and Charlotte respectively (Guo, 2016). Conservative state legislators were very upset with the actions taken by the more liberal cities in their states. The conservatives felt that the only way to prevent the spread of gay rights laws was to outlaw them at the state level. At first blush, it appears that these state laws would be in direct violation of the Supreme Court's decision in *Romer v. Evans*. The main difference, however, is while the Colorado law at issue in *Romer* specifically targeted discrimination based on sexual orientation, the new generation of laws are silent on what type of local anti-discrimination laws are preempted by the state laws (Guo, 2016). The writers of these laws have learned from the past, and they hope that the courts will not strike down their state prohibitions against local anti-discrimination laws because they do not directly mention local laws designed to protect the LGBT community. Even though the state bans on local anti-discrimination laws are carefully worded, their intent is unambiguous. As Guo notes, "The impact of these laws is clear though. In North Carolina, for instance, the immediate effect will be to make LGBT discrimination legal again in Charlotte" (Guo, 2016).

Perhaps the most sweeping of the new anti-LGBT laws is the one passed in North Carolina in March of 2016. The new law has three general provisions (see Fausset and Blinder, A12). First, the law created a new state-wide anti-discrimination policy that intentionally left out discrimination on the basis of sexual orientation or gender identity. This part of the law then prohibits local anti-discrimination ordinances that provide more protection than the state law. Secondly, the law prohibits many discrimination suits from being filed in state courts. Third, in reaction to local laws that protect the rights of transgendered people, the North Carolina law requires that individuals must use the public restroom, shower, or changing room of the sex that is on their birth certificate. In effect, it prevents transgendered people from using the bathroom and other facilities of their choice if their gender identity does not match the sex listed on their birth certificate (see Fausset and Blinder, A12). Like in many states, it is very difficult to change the sex on a birth certificate in North Carolina short of sex reassignment

surgery (Ross). The state legislature in South Dakota passed a similar anti-transgender bill in 2016, but the governor vetoed it (Smith).

There was intense outrage after the passage of the North Carolina anti-LGBT law. The American Civil Liberties Union immediately filed suit, arguing that the North Carolina law violated the federal Constitution's Equal Protection Clause. The federal government argued that the new law also violated federal statutes, including the Civil Rights Act. The federal government also threatened to cut off well over \$1 billion dollars in federal aid to the state, and especially to the University of North Carolina higher education system (Robertson, A2). Many businesses threatened to stop doing business in the state, governmental officials from more liberal states forbade their employees to travel to North Carolina, and several famous musicians such as Bruce Springsteen cancelled concerts in the state (Fausset and Blinder, A12). The National Basketball Association (NBA) also moved its 2017 all-star game from Charlotte to New Orleans because of the new law (Martel).

The state's Republican Governor, Pat McCrory, was running for reelection in 2016 and fully supported the new legislation. In response to the intense protests against the new law, however, he did sign an executive order granting some protections to state employees who are gay or lesbian. He also said he would ask the legislature to allow state courts to hear discrimination suits again. McCrory's Democratic opponent in the November 2016 election for Governor, state Attorney General Roy Cooper, refused to defend the new law in court, saying that it was clearly unconstitutional (Fausset and Blinder, A15).

North Carolina is part of the federal Fourth Circuit Court of Appeals, and it appears that the transgender provisions in the state law violate federal civil rights statutes and thus are illegal, according to the recent Fourth Circuit decision in *G.G. v. Gloucester County School Board*, —F.3d.— (Fourth Circuit 2016). Not surprisingly, it seems that Governor McCrory has not mentioned that recent federal appeals court decision. Like many conservatives, McCrory has focused on the dangers of allowing transgendered people into the restroom of their choice, saying that the practice would encourage men (whether transgendered or not) to attack women in the bathrooms. As one commentator has noted, "Activists have used the bathroom debate as a venue for rolling back broader civil rights protections, arguing that allowing transgender people into the supposedly safe spaces of single-sex bathrooms creates dangerous scenarios and violates privacy and common sense" (Balingit).

In reaction to threats from the federal government to cut off federal funds to the state, Governor McCrory filed suit against the federal government, arguing that the federal Department of Justice and other federal agencies that claimed that the law violated the Civil Rights Act of 1964, Title VII, and Title IX were advocating a “radical reinterpretation” of the nation’s civil rights statutes and a “baseless and blatant overreach” of federal power over the states. Governor McCrory called on Congress to clarify the law, arguing that the Obama Administration was bypassing Congress through its bureaucratic interpretations of the civil rights statutes, which he claimed afforded no protection against discrimination on the basis of sexual orientation or gender identity. He also said that the concept of gender identity cannot be defined by the law. Finally, the Governor refused to accept the federal government’s assertion that the new state law openly encouraged discrimination against LGBT people (Blinder, Perez-Pena, and Lichtblau, A1).

The federal Department of Justice (DOJ) responded to the state’s lawsuit by filing a suit of their own just hours after the state filed its suit, claiming that the North Carolina law was in clear violation of the federal civil rights statutes because discrimination on the basis of sexual orientation and gender identity is simply a version of sex discrimination that is clearly prohibited by federal laws. U.S. Attorney General Loretta E. Lynch argued, “This is about the dignity and respect that we accord our fellow citizens and the laws that we as a people and a country have enacted to protect them” (quoted in Berman and Larimer, A2). Attorney General Lynch then compared discrimination against LGBT people to historical discrimination on the basis of race. As the Attorney General noted by alluding to the Jim Crow racial segregation laws of the past, “It was not so very long ago that states, including North Carolina, had other signs above restrooms, water fountains and on public accommodations, keeping people out based on a distinction without a difference” (quoted in Perez-Pena and Lewin, A11). The Department of Justice and the Department of Education followed up their lawsuit by sending a letter to all schools and universities in the country, stating that these educational institutions must protect the rights of transgendered individuals to use the facilities of their choice. The letter threatened lawsuits for any school or university that does not comply with the Obama Administration’s interpretation of the federal civil rights statutes (Davis and Apuzzo). In response, 11 states sued the federal government, claiming that the Obama Administration’s interpretation of the civil rights laws exceeded its authority (Montgomery and Blinder).

It is possible that the courts will treat claims based on sexual orientation and gender identity differently. The federal Equal Employment Opportunity Commission, the federal Department of Education, and the federal Department of Justice have clearly stated their view the word “sex” in the Civil Rights Act of 1964 and its accompanying legislation includes gender identity. Thus, discrimination against transgendered individuals could be covered under the Civil Rights Act without also offering the same protection against discrimination on the basis of sexual orientation. While the U.S. Supreme Court has been silent on the rights of transgendered individuals, several U.S. Courts of Appeals have taken a position on the issue, most siding with the rights of transgendered persons. In 2004, the Sixth Circuit ruled that discrimination against transgendered people is sex discrimination under the Civil Rights Act, as did the Eleventh Circuit in 2011 and the Fourth Circuit in 2016. However, in 2007 the Tenth Circuit went the other way, finding no protections for transgendered individuals in federal anti-discrimination laws (Perez-Pena and Lewin, A11). It is also possible that the courts will treat discrimination against transgendered people as the same as sex discrimination for constitutional purposes, and thus use the same intermediate review equal protection analysis used in determining constitutionally based sex discrimination cases. It is also conceivable that discrimination on the basis of gender identity would be covered under the federal civil rights statutes, while discrimination on the basis of sexual orientation would only be covered by constitutional claims. That would still leave constitutional discrimination claims based on sexual orientation to receive the rational basis test under the *Romer* precedent.

Thus, the North Carolina anti-LGBT law and other similar state laws may eventually force the U.S. Supreme Court to decide what level of review future courts should use for constitutional claims of discrimination on the basis of sexual orientation or gender identity. Maybe the Supreme Court will apply the same analysis to these two types of discrimination and perhaps it will treat them differently. Nonetheless, the Supreme Court needs to clarify the situation. Perhaps the Court will follow the *Romer* precedent and use the rational basis test to declare these state attacks on LGBT people to be unconstitutional. But a much better approach would be for the Supreme Court to recognize that LGBT individuals and other gender non-conforming persons are a suspect class that should be thought of in terms of a discrete and insular minority. Justices Brennan and Marshall agreed with this conclusion in their dissent to the denial of certiorari in *Rowland v. Mad River Local School*

District, 470 U.S. 1009 (1985), when they stated, “Homosexuals constitute a significant and insular minority of this country’s population ... [and] have historically been the object of pernicious and sustained hostility.”

The recently enacted anti-LGBT state laws seem to prove the fact that the LGBT community is being specifically targeted for discrimination, in part as a backlash against the Supreme Court’s same-sex marriage decisions. At a minimum, the Court should treat constitutional claims of discrimination against LGBT people as deserving intermediate review such as sex discrimination cases now receive. But LGBT people are clearly a suspect class that deserves the protection of strict scrutiny analysis in equal protection cases. As one commentator has concluded, “The Court’s failure to declare sexual orientation a suspect classification has resulted in concrete harm to gays and lesbians” (Nicolas, 142). If anything, the new generation of state anti-LGBT laws prove that the Court’s approval of same-sex marriage has not eliminated other forms of discrimination on the basis of sexual orientation or gender identity. The Supreme Court needs to take action to protect this vulnerable minority.

Works cited

- Associated Press. 2016. LGBT Rights Groups Win as US Judge Blocks Mississippi Law. *The New York Times*, July 1, 2016.
- Balingit, Moriah. 2016. Federal Appeals Court Sides with Transgender Teen, says Bathroom Case Can Go Forward. *The Washington Post*, April 19, 2016.
- Berman, Mark. 2016. Mississippi Governor Signs Law Allowing Businesses to Refuse Service to Gay People. *The Washington Post*, April 5, 2016.
- Berman, Mark and Sarah Larimer. 2016. N.C., US File Dueling Suits Over Transgender Law. *The Boston Globe*, May 10, 2016, A2.
- Bernhard, Meg. 2016. Governor Baker Signs Transgender Bill into Law. *The Boston Globe*, July 8, 2016.
- Bernstein, David. 2015. Justice Kennedy’s Opinion in Gay Marriage Case May Upend Fifty-plus Year of Settled Equal Protection and Due Process Jurisprudence. *The Washington Post*, June 26, 2015.
- Blinder, Alan. 2015. Kentucky Clerk in Gay Marriage Dispute, Kim Davis, Joining G.O.P. *The New York Times*, September 25, 2015.
- Blinder, Alan and Richard Perez-Pena. 2016. Georgia Governor Rejects Bill Shielding Critics of Same-Sex Marriage. *The New York Times*, March 29, 2016, A12.
- Blinder, Alan, Richard Perez-Pena, and Eric Lichtblau. 2016. Countersuits Over North Carolina’s Bias Law. *The New York Times*, May 9, 2016.
- Blow, Charles M. 2016. The GOP’s Cynical Gay Ploy. *The Boston Globe*, June 20, 2016, A19.
- Carpenter, Dale. 2015. Anti-gay Discrimination is Sex Discrimination, says the EEOC. *The Washington Post*, July 16, 2015.

- Colucci, Frank J. 2009. *Justice Kennedy's Jurisprudence: The Full and Necessary Meaning of Liberty*. Lawrence, KS: University Press of Kansas.
- Davis, Julie Hirschfeld. 2014. Obama to Issue Order Barring Anti-Gay Bias by Contractors. *The New York Times*, July 18, 2014.
- Davis, Julie Hirschfeld and Matt Apuzzo. 2016. U.S. Directs Public Schools to Allow Transgender Access to Restrooms. *The New York Times*, May 12, 2016.
- Ely, John Hart. 1980. *Democracy and Distrust: A Theory of Judicial Review*. Cambridge, MA: Harvard University Press.
- Epstein, Lee and Thomas G. Walker. 2016. *Constitutional Law for a Changing America: Rights, Liberties, and Justice*, 9th edition. Los Angeles: CQ Press.
- Farber, Daniel A. and Suzanna Sherry. 1996. The Pariah Principle. *Constitutional Commentary*, 13:257-284.
- Fausset, Richard. 2016. Rewards and Risks for G.O.P. Legislatures in Social Agenda. *The New York Times*, April 1, 2016, A13.
- Fausset, Richard and Alan Blinder. 2016. Bias Law Deepens Rifts in North Carolina. *The New York Times*, April 12, 2016, A12.
- Fisher, Louis and Katy J. Harringer. 2016. *American Constitutional Law*. Durham, NC: Carolina Academic Press.
- Greenawalt, Kent. 2015. *Interpreting the Constitution*. New York: Oxford University Press.
- Guo, Jeff. 2015. Here's How to Use Religious Freedom Laws to Fend Off a Gay Discrimination Suit. *The Washington Post*, April 3, 2015.
- _____. 2016. The Cunning Trick in North Carolina's Radical New Anti-LGBT Law. *The Washington Post*, April 1, 2016.
- Katz, Jonathan M. and Erik Eckholm. 2016. Laws Blocking Gay Rights Efforts Bring a Backlash in Two Southern States. *The New York Times*, April 6, 2016, A13.
- Klarman, Michael J. 2013. *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage*. New York: Oxford University Press.
- Knowles, Helen J. 2009. *The Tie Goes to Freedom: Justice Anthony M. Kennedy on Liberty*. Landham, MD: Roman and Littlefield.
- Lichtblau, Eric and Richard Fausset. 2016. U.S. Warns North Carolina to Change Bias Law. *The New York Times*, May 5, 2016, A1.
- Martel, Brett. 2016. NBA Chooses New Orleans for 2017 All-Star Game. *The Washington Post*, August 19, 2016.
- Mezey, Susan Gluck. 2007. *Queers in Court: Gay Rights Law and Public Policy*. Lanham, MD: Rowman and Littlefield.
- Mohr, Richard D. 1988. *Gays/Justice: A Study of Ethics, Society, and Law*. New York: Columbia University Press.
- Montgomery, David and Alan Blinder. 2016. States Sue Obama Administration Over Transgender Bathroom Policy. *The New York Times*, May 26, 2016.
- Moyer, Justin William. 2014. Why Houston's Gay Rights Ordinance Failed: Fear of Men in Women's Bathrooms. *The Washington Post*, November 4, 2014.
- New York Times. 2012. Editorial: A Big Leap for Marriage Equality. *The New York Times*, November 7, 2012.
- Nicolas, Peter. 2015. Obergefell's Squandered Potential. *The Circuit*, a publication of the *California Law Review*. 6:137-144.
- Pedriana, Nicholas. 2009. The Lesbian, Gay, Bisexual, and Transgender Movement's Legal Framing of Sodomy Laws in the *Lawrence v. Texas* Case. In Scott Barclay, Mary Bernstein, and Anna-Maria Marshall, eds. *Queer Mobilizations: LGBT Activists Confront the Law*. New York: New York University Press.

- Perez-Pena, Richard and Tamar Lewin. 2016. Mulling a 1964 Act's 2016 Reach. *The New York Times*, May 11, 2016, A1 and A11.
- Pinello, Daniel R. 2006. *America's Struggle for Same-Sex Marriage*. New York: Cambridge University Press.
- Rein, Lisa and Karoun Demirjian. 2016. LGBT Groups Gird for Battle against Religious-based Legislation in Congress. *The Washington Post*, April 29, 2016.
- Richards, David A.J. 2009. *The Sodomy Cases: Bowers v. Hardwick and Lawrence v. Texas*. Lawrence, KS: University Press of Kansas.
- Robertson, Gary D. 2016. N.C. Looks Unlikely to Retreat on Transgender Law. *The Boston Globe*, May 9, 2016, A2.
- Robertson, Campbell and Richard Fausset. 2016. Cities in South Split with States on Social Issues. *The New York Times*, April 16, 2016, A1.
- Ross, Janell. 2016. How Easy is it to Change the Sex on Your Birth Certificate? *The Washington Post*, May 18, 2016.
- Sanders, Steve. 2016. RFRAs and Reasonableness. *Indiana Law Journal*, 91:243-66.
- Smith, Mitch. 2016. South Dakota Governor Vetoes Restriction on Transgender Bathroom Access. *The New York Times*, March 1, 2016.
- Stone, Amy L. 2009. Like Sexual Orientation? Like Gender? Transgender Inclusion in Non-discrimination Ordinances. In Scott Barclay, Mary Bernstein, and Anna-Maria Marshall, eds. *Queer Mobilizations: LGBT Activists Confront the Law*. New York: New York University Press.
- Werner, Erica. 2016. Amid Shouts of "Shame", House GOP Defeats Gay Rights Measure. *The Washington Post*, May 19, 2015.

Table of Cases

- Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (1993).
- Bowers v. Hardwick*, 478 U.S. 186 (1986).
- Brown v. Board of Education*, 347 U.S. 483 (1954).
- G.G v. Gloucester County School Board*, —F.3d.— (Fourth Circuit 2016).
- Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E. 2d 941 (2003).
- Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).
- Lawrence v. Texas*, 539 U.S. 558 (2003).
- Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).
- Romer v. Evans*, 517 U.S. 620 (1996).
- Rowland v. Mad River Local School District*, 470 U.S. 1009 (1985).
- United States v. Carolene Products Co.*, 304 U.S. 144 (1938).
- United States v. Windsor*, 133 S. Ct. 2675 (2013).